

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
EASTERN DIVISION  
No. 4:06-CR-72-D  
No. 4:09-CV-162-D

EDWARD A. FERREL VIDAL

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**ORDER**

On September 18, 2009, Vidal (“Vidal” or “petitioner”) filed a motion to vacate pursuant to 18 U.S.C. § 2255 [D.E. 32]. On March 3, 2010, the United States (“respondent”) filed a motion to dismiss [D.E. 37] pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. On April 22, 2010, Vidal responded to the motion to dismiss [D.E. 45], to which respondent replied [D.E. 46]. On January 19, 2011, this court granted respondent’s motion to dismiss. On February 14, 2011, Vidal filed a motion for a certificate of appealability [D.E. 50].

A certificate of appealability may issue only if the applicant has made a “substantial showing” of denial of a constitutional right. 28 U.S.C. § 2253(c)(2). Where a district court denies a petitioners constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists could debate whether the issue should have been decided differently or show the issue is adequate to deserve encouragement to proceed further. See, e.g., Miller-El v. Cockrell, 537 U.S. 322, 336–38 (2003). A certificate of appealability will not issue for claims dismissed by a district court solely on procedural grounds unless the petitioner can demonstrate both “(1) ‘that jurists of reason would find it debatable whether the petition [or motion] states a valid claim of denial of a constitutional right’ and (2) ‘that jurists of reason would find it debatable whether the district court

was correct in its procedural ruling.” Rose v. Lee, 252 F.3d 676, 684–85 (4th Cir. 2001) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)).

Vidal has failed to meet the requirements for a certificate of appealability. Vidal’s motion to vacate was untimely and the court properly dismissed it [D.E. 47]. Vidal has not shown that reasonable jurists would find that decision debatable or that the issues are adequate to receive encouragement to proceed further. Therefore, he is not entitled to a certificate of appealability, and his motion [D.E. 50] is DENIED.

SO ORDERED. This 15 day of February 2011.

  
JAMES C. DEVER III  
United States District Judge